

No. 22,778

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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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NATIONAL LABOR RELATIONS BOARD  
Petitioner

v.

GEORGE PEARCE, d/b/a G. P. TRUCKING COMPANY,  
Respondent

---

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL  
LABOR RELATIONS BOARD

---

BRIEF FOR GEORGE PEARCE, d/b/a G. P. TRUCKING COMPANY

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STATEMENT OF THE CASE

Respondent (hereinafter called Pearce) desires to add a few significant additions to the Board's statement of the case. Before doing so, we should point out to the court that the references to the transcript set forth in the Board's brief, wherein Pearce and his dispatcher,



Delbert Williams (hereinafter called Williams), are alleged to have committed unfair labor practices, are always references to the testimony of the Charging Party's witnesses. Little purpose can be served by pointing out to the court that Pearce and Williams testified at variance with said witnesses.

The Board's brief starting on page 3 mentioned the alleged unlawful interrogation of Floyd Sims by Williams. It might be well at this point to call to the court's attention the testimony of Mr. Sims and the Trial Examiner's reaction to it, which could hardly have been otherwise. On pages 80-84 of the transcript Sims is cross-examined by employer's counsel. The testimony there shows that Sims had applied for employment at Metzler Trucking Company on March 2, 1966, which was four days before his alleged troubles with Pearce and six days before he was alleged to have been discharged by Pearce for union activity. Pearce at all times testified that Sims was not discharged at all but that he quit and stated that he had other employment.

Sims jumped from one fabrication to another on re-direct examination and under examination by the Trial Examiner (Tr. 105-109). The Trial Examiner on page 10 of his decision, which was adopted by the Board, at line 31 found that Sims did, in fact, file an application



for employment on March 2, 1966.

The so-called anti-union petition quoted on page 7 of the Board's brief was requested by employees of Pearce (Tr. 232).

#### ARGUMENT

##### I.

THERE IS NO SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE WHICH SUPPORTS THE BOARD'S FINDING THAT FLOYD SIMS WAS DISCHARGED IN VIOLATION OF SECTION 8(a)(1) OF THE ACT.

At the outset we feel constrained to point out to the court, as we repeatedly did in our exceptions to the Trial Examiner's decision and brief in support thereof, that in no single instance did the Trial Examiner make a finding in favor of Pearce. He strained at every gnat and swallowed every camel in order to twist each finding against Pearce. He even did this with respect to the witness Sims, whose testimony is above referred to and will be further discussed below. In some of these instances there was no substantial evidence as required, or any evidence at all, upon which to base the decision of the Trial Examiner which was adopted by the Board as its decision.

We submit that in the case of Mr. Sims the credibility of his testimony can be determined more by written exhibits in his own handwriting (Resp. Exh. 2) and his



ridiculous efforts to explain the obvious fact that what he said on direct examination and what he had recorded at Metzler Trucking on March 2, 1966 were irreconcilable, than by attempting to argue the merits of his many charges which were denied by Pearce and Williams. This man testified that he was discharged but made no mention on direct examination of applying for other work on March 2, 1966 before the alleged discharge on March 8, 1966. It was agreed by all witnesses that Sims worked for Pearce until March 6, 1966.

Probably the best example of his complete irresponsibility as a witness appears on pages 108 and 109 of the transcript where he was being examined by the Trial Examiner. Starting with line 13 on page 108, the testimony is as follows:

TRIAL EXAMINER: Well, when you put down March 2, did you think it was the correct date?

THE WITNESS: I couldn't say I even thought about the date, sir.

TRIAL EXAMINER: How did you come to pick March 2?

THE WITNESS: Just by pencil and just writing.

TRIAL EXAMINER: You just pulled the date out from the air and wrote it down?

THE WITNESS: In the past date, yes.

TRIAL EXAMINER: I am talking about when you filled out that application.



THE WITNESS: Well, I'd rather backdate as postdate it.

TRIAL EXAMINER: Why didn't you put the correct date down?

THE WITNESS: That I don't know.

TRIAL EXAMINER: You say you didn't know whether March 2 was right?

THE WITNESS: Well, it had to be the wrong date, sir. But at the time I didn't let -- just like I say, I didn't think the date was so important as the job was.

TRIAL EXAMINER: Mr. Sims, I must advise you that the answers that you are giving me are not very satisfactory answers. Is there anything like on this subject you would care to say?

THE WITNESS: I knew at the time that I was backdating the application.

TRIAL EXAMINER: Will you tell me why?

THE WITNESS: The reason why I don't know. I just backdated it.

TRIAL EXAMINER: Surely you had a reason for backdating it?

THE WITNESS: I don't know why it would be.

TRIAL EXAMINER: Do you normally backdate things?

THE WITNESS: Well, at times, yes, sir.

TRIAL EXAMINER: For any particular reason?

THE WITNESS: No, sir.

In view of such testimony, it certainly is no wonder then that the Trial Examiner and Board, starting at line 25 on page 10 of the decision found Sims to be "evasive" and ". . . not a reliable witness."



The obvious truth is that Sims quit his job on or about March 6, 1966 after applying for work at Metzler and several other trucking firms, including West Side Trucking, on March 2, 1966. He was in an excellent position to stop at Metzler's any time he chose for he drove past it several times a day while hauling for Pearce (Tr. 119). He got a job at West Side Trucking Co. so quit just as Pearce and Williams testified.

The truth on the question of when Sims applied for and got a job elsewhere goes to the very essence of the charge he was discharged for union activity as opposed to quitting his job. If he applied for other work, which we know he did on March 2, 1966, then he very likely got the job then and was, in fact, ready to quit on March 6, 1966. Even here we must point out that not only Pearce said he tried to get the man to take a few days off rather than quit, but Sims said the same thing (Tr. 96).

Mr. Sims, as well as employees Crider and Millican, made several unguarded statements, to which we would like to call the court's attention, which were in sharp conflict with their rash of complaints against Pearce and which often substantiated the testimony of Pearce or portrayed him as being an employer completely at variance with the one these witnesses tried to paint. Mr. Sims stated that his job was a good job (Tr. 60)



and that he was the one who raised the hospital and dental plan question (Tr. 60). The latter statement bore out the contention of Pearce.

## II

THERE IS NO SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE WHICH SUPPORTS THE BOARD'S FINDING THAT CARL REAGAN WAS DISCHARGED IN VIOLATION OF SECTION 8(a)(1) OF THE ACT.

The Board's brief leaves out any references to the testimony of Pearce which actually lead to the discharge of Reagan, which immediately preceded it, and demonstrated what Pearce meant when he referred to Reagan as arrogant and trying to take over the company. The testimony to which we refer is the testimony of Pearce concerning the reckless and contemptuous conduct of Reagan on the day before his discharge and the fact that on the day of his discharge Pearce observed Reagan going through a stop sign (Tr. 237-239). Surely it can not be said that Pearce was discharging this arrogant man because of his union activity because, as pointed out in the Board's brief, one week previous to the discharge and after Reagan's activity was well known, he, by his own admission, was urged by Pearce to remain on the job after Williams had allegedly fired him (Tr. 18). If Pearce had been looking for a chance to get rid of this man because of union activity, he had it when Reagan said, ". . . I was leaving."



(Tr. 18) Instead, Pearce prevailed upon Reagan to stay and kept him until he was obviously an intolerable threat to the driving public, as well as this employer's equipment and contract with Spreckles Sugar Company. If Reagan was discharged for not signing the petition that Pearce prepared at the suggestion of some of the employees, then why were Reagan and Sims not fired the same day? All of the evidence points to the fact being that Sims' name was scratched off the list of signatures to the petition because he quit his job the day he signed and Reagan stayed on until his actions as a driver were intolerable.

The testimony of all parties, including Reagan (Tr. 22-23) reflects no pressure put on this man or objections by Pearce or Williams when Reagan refused to sign. On the contrary, all evidence indicates that signing was voluntary in the spirit of the philosophy of freedom of choice as expressed by Pearce (Tr. 244) and his policy of not discriminating (Tr. 264). These statements could be called self-serving, but in looking for evidence from the opposition to corroborate them, it is certainly found in the testimony of employee Millican, where, with respect to signing a union authorization card, he quoted Pearce as saying, "That's your American right." (Tr. 204) In this regard, there was further evidence from the employer's witness Floyd Covey of Spreckles Sugar Co. who



was present when all parties signed, which corroborated the fact that no pressure was exerted against any employee to sign the petition (Tr. 307-10).

To build a case against the employer with respect to the discharge of Reagan, counsel for the General Counsel sought to show through Charles Chastain of Cal-Farm Insurance that Pearce must have instigated the restriction of Reagan from his insurance policy. We earnestly submit that this effort and the rulings thereon by the Trial Examiner, which were adopted by the Board, constitute a serious and reversable error. We will deal briefly with this question at this point and go into more detail in regard to the discharge of William J. Crider later in this brief since, it seems to us, the case with regard to Crider rests entirely upon the improper admission of purely hearsay testimony from the witness Chastain.

Aside from the question of error with respect to the admission of the testimony of Chastain, the effort through him to show that Pearce must have instigated the restriction of Reagan from the policy falls on its face when we consider that Reagan had not worked for Pearce for one and a half months before Pearce is supposed to have caused Reagan to be restricted. In addition, the beet-hauling season was about to end and Reagan would have thereupon ceased to be an employee in any event. The testimony of



Mr. Chastain commences on page 384 of the transcript.

With respect to the witness Chastain, Pearce, for some reason contrary to accepted practice in other legal fields, did not have the equal benefit of statements of Chastain secured by a NLRB investigator. This certainly puts an employer at an unfair disadvantage. The result is that on the spur of the moment he is required to answer alleged facts kept secret from him, and naturally does not wish to delay the hearing interminably by postponements to get additional witnesses who might be in faraway places or whose whereabouts might be unknown.

### III

THERE IS NO SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE WHICH SUPPORTS THE BOARD'S FINDING THAT WILLIAM CRIDER WAS DISCHARGED IN VIOLATION OF SECTION 8(a)(1) OF THE ACT.

Respondent in this proceeding believes that the Board found the discharge of William Crider to be a violation of the Act on the basis of no real evidence at all, except the admittedly hearsay testimony of Charles Chastain. Without the hearsay testimony of Chastain, the alleged wrongful discharge is based on unfounded inferences and the pure opinion of the Trial Examiner. Mr. Chastain testified that a Mr. Mueller told him certain things of which he made brief notes on G.C. Exh. 11. Mr. Mueller was never produced as a witness for the



Charging Party and no reason was presented for this failure and the consequent lack of opportunity for cross-examination by the employer's counsel. The employer's counsel objected to the admission of the notes and of the witness's testimony therefrom except to prove the fact a phone call was made to the witness (Tr. 394-395). The Trial Examiner then stated: "I will accept it solely to establish the fact that this phone call was made to the witness." (Tr. 395, lines 14-15) After further questions and answers, the counsel for the General Counsel then proceeded not only to be content with proof that a call was made, but insisted upon having the witness testify to the substance of what Mr. Mueller said. Upon further objection by employer's counsel, the Trial Examiner then stated: "I am going to overrule the objection and accept the testimony to show that certain matters were stated to the witness, but I am not going to permit these matters to have probative weight." (Tr. 396-400)

We submit that the Trial Examiner was clearly attempting to go in two directions at one time. After the Trial Examiner's above-mentioned ruling, which appears on page 398, lines 11-14 of the transcript, he then proceeded to allow the handwritten notes which resulted solely from what Mueller told the witness to be the sole explanation and reason for Chastain's writing G.C. Exh. 9. G.C. Exh. 9



in turn is the only possible substantial evidence to sustain the charge of wrongfully discharging Crider (Tr. 403).

Now let us take a look at the Trial Examiner's decision which was adopted by the Board. On page 14, line 7, the Trial Examiner is quoting the text of the pure hearsay he admitted in evidence as proof -- not of the fact a call was made, but of the facts alleged to have been so stated by the absent Mueller to Chastain. This abuse by the Trial Examiner again appears on page 14 of his decision at lines 35-36. This error is compounded by the fact Chastain's sworn testimony makes it abundantly clear that he had no actual recollection at all of what was said during the hearsay conversation. His cold notes were obviously the only evidence before the Trial Examiner, and they were only notations of a conversation with a third party, and, as pointed out, were hearsay in the purest form.

The facts as shown by the evidence are that Pearce let Crider go only the day before the season ended (Tr. 158 and Tr. 251) and that Williams went so far as to suggest that Crider go to Sacramento and try to get his driving matters straightened out. Crider chose to do nothing but draw his unemployment insurance (Tr. 159) until the Charging Party decided the Crider case could



be used as further harrassment of Pearce. Please note that Crider saw Williams after he had been told by the latter he would not be rehired and should try to get the matter straightened out but Crider did not even mention the subject of his employment to Williams (Tr. 162-163). The testimony showed that it was common knowledge that other drivers had had the same problem as Crider and straightened the matter out (Tr. 250). Crider was not taken off the job until Pearce had received official notice from his insurance carrier that coverage as to Crider had been cancelled (Tr. 245-246). It should be noted that Crider did not on direct or cross-examination say that he was discharged or fired -- only that he would not be rehired (Tr. 262) and that he should try to get his traffic citation problem straightened out (Tr. 161). Crider knew other drivers had had the same sort of problem and that something could be done (Tr. 170). There was certainly no reason to go through a circuitous route of instigating the cancellation of insurance on Crider and then having to actually fire him because of it when there was only one-half day of the hauling season left.

At this point we should point out to the court that the real leaders of the union movement, such as the witness Millican for the Charging Party, were not fired. Millican, in fact, even acted as the union's observer



at the election (Tr. 258-259) and yet not only was not fired, but continued to receive the highest pay of any of Pearce's drivers (Tr. 273). It is hard to find anything in the transcript concerning Pearce's alleged unfair discrimination which is not cast under a shadow of the greatest suspicion as to veracity by these uncontradicted facts concerning Millican. Aside from this resulting suspicion and doubt concerning the veracity of the Charging Party's witnesses, there is, with respect to Crider, the simple fact that when the season ended the day after Crider's forced discharge, Pearce would then no longer be his employer and could simply have eliminated this man, if that was his plan, by not rehiring him when Pearce commenced operations in the future. In this regard, however, Pearce stated under oath that he would rehire Crider if Crider could get himself reinstated with the insurance company, and that Pearce had made the same statement long previous to the hearing when interviewed by an investigator from the NLRB (Tr. 251).

Toward the end of Crider's testimony there are several pages of loose talk that clearly show that when reminded of his reason for testifying, he could find nothing but fault with Pearce, in contrast to his off-guard statements that Pearce was a truthful man (Tr. 143) and a "top-flight" employer (Tr. 154). While this over-eager witness



denied any threats of violence because he only weighed 180 pounds, it is submitted that he is exactly the type that would get carried away when feeling important and threaten to do the things Wallace Williams, Jr. testified to (Tr. 372 and Tr. 375).

It is interesting to note that Crider claimed to have been present at all three of the meetings Pearce had with his men. He also appeared to know the other men's stories better than they did, but we believe Crider was actually so carried away by his imagined importance that he filled in many a detail that simply seemed logical or necessary to this talkative man in order to make a case. It is obvious that Crider jumped at faulty conclusions concerning the question of whether Pearce was going to sell his trucks. We submit that it was from this entirely erroneous conclusion of Crider that the whole subject of selling out because of the union and putting the employees out of work probably arose. We know that Crider testified in considerable detail about the fact that he really pushed the idea of unionization when he thought he discovered a conspiracy on the part of Pearce to sell out and leave the men without work (Tr. 157). We know, of course, that Pearce did not sell any equipment and that the Metzler matter referred to by Crider (Tr. 155-156) involved nothing more than the leasing of a couple of Pearce's



trucks to Metzler after the season was over, which simply gave Pearce's employees work they otherwise would not have had (Tr. 259-260 and 262-263).

We urge upon the court the fact that Pearce did not employ any truck drivers between the first of May and approximately July 18, 1966 and yet he voluntarily rehired all of the men who were available, including those whom he knew to be most active in the union movement (Tr. 235-236). This rehiring could have included Crider had he wanted to correct his problem and come back to work.

Mr. Chastain repeatedly stated that he had no independent recollection of the contents of his conversation with Mueller (Tr. 399) yet after being constantly lead in detail by counsel for the General Counsel and after being embarrassed with his alleged contradiction between his earlier statement to a NLRB investigator and his testimony, he then saw fit to even go so far as to place Pearce in the presence of Mueller at the time the latter telephoned Chastain. This was denied by Pearce. Such an alleged recollection is certainly not reflected in his notes on G. C. Exh. 11. In fact, his notes clearly indicate that Mueller contacted Pearce and learned that Pearce said Williams is O.K. and that Crider and Reagan were not safe drivers. This comment is then followed by a period, followed by the words "Will ask for restriction of them."



The only logical explanation of this old note is that Mueller was late in getting his information to Chastain and that it was Chastain, not Pearce, who decided to ask for the restriction.

Crider, along with other witnesses, testified to a rash of alleged threats and promises by Pearce, but we respectfully submit that the evidence when taken as a whole clearly shows that Pearce did nothing more than offer to sell his employees his trucks on some form of workable basis since they appeared to be dissatisfied. This, we submit, does not constitute offering increased wages or preferred conditions of employment or fringe benefits. In addition, he apparently answered inquiries concerning a hospitalization plan and a bonus. The hospitalization plan had been previously discussed so was not anything new. Furthermore, Pearce was answering the employees' questions, and we can find nothing in the Act which prohibits this response. With regard to the bonus, the truth is that Pearce in answering employees' questions simply stated that there might be a bonus but that he wouldn't guarantee that there would be one. This reflected nothing different from his past practice (Tr. 230-231). Furthermore, Pearce pointed out that questions concerning the bonus were extremely frequent to the point of becoming suspicious as to the real motive involved (Tr.



231).

With respect to the petition, the evidence is that it was prepared at the request of several employees. (Tr. 232). Logic certainly dictates that this is the way it must have happened, for we must keep in mind the testimony of Crider where he stated Pearce said, "'Now, fellows, it is up to you.'" (Tr. 143-144) When the matter was left that way, it is obvious that something was instigated by the employees and that Pearce was merely following their direction. After all, it is unlikely that a truck driver would have a typewriter available to prepare his own petition. All of the evidence shows that at the time the petition was signed nobody is alleged to have threatened drivers in order to get their signatures.

#### IV

##### LAW AS IT PERTAINS TO FACTS

1. The Board is entitled to draw reasonable inferences from the evidence but it can not create inferences where there is no substantial evidence upon which the inferences may be based.

N.L.R.B. v. Kaiser Aluminum & Chem. Corp., 217 F.2d 366,368 (C.A. 9; 1954).

In this case the court on page 368 states as follows:



"Discrimination relates to the state of mind of the employer. 'The relevance of the motivation of the employer in such discrimination has been consistently recognized \* \* \*.'<sup>1</sup> The General Counsel had the burden of the issue. Substantial evidence must have been adduced (1) to show the employer knew the employee was engaging in a protected activity, (2) to show that the employee was discharged because he had engaged in protected activity, and (3) to show the discharge had the effect of encouraging or discouraging membership in a labor organization. Although the Board is entitled to draw reasonable inferences from the evidence, it cannot create inferences where there is no substantial evidence upon which these may be based. Unless there is reasonable basis in the record for making of the three essential findings, the employer who is permitted to discharge 'for any reason other than union activity or agitation for collective bargaining with employees'<sup>2</sup> need not justify or excuse his action."

Shattuck Denn Mining Corp., (Iron King Branch)

v. N.L.R.B., 362 F.2d 466 (C.A. 9; 1966).

In this case the above court stated on page 469 that inferences must be based upon evidence and cited the above Kaiser Aluminum case. In the Shattuck case this court also made the very cogent point that the Board may not infer an unlawful motive if the evidence clearly supports an inference of lawful motive and cited the case of N.L.R.B. v. Huber & Huber Motor Express, Inc.,

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1. Radio Officers' Union of the Commercial Telegraphers Union, AFL v. N.L.R.B., 347 U.S. 17, 43, 74 S. Ct. 323, 337, 98 L.Ed. 251.

2. Associated Press v. N.L.R.B., 301 U.S. 103, 132, 57 S. Ct. 650, 655, 81 L.Ed. 953.



223 F.2d 748 (C.A. 5; 1955). The above court in the Huber case first quoted Section 10(c) of the Act and then went on to state on page 749: "As stated above, the record discloses that there existed several reasons for the unpopularity of Barnett, both with the management and with the Union Officers, and where the Board could as reasonably infer a proper collateral motive as an unlawful one, the act of the management cannot be set aside by the Board as being improperly motivated."

We quote the above important point of law for the following reasons: (1) In the case of the discharged employee Reagan, the evidence is replete with justifiable reasons and lawful reasons for discharge. (2) In the case of Crider, the Board's finding amounts to nothing but an inference based upon what, we believe, to be inadmissible evidence. (3) In the case of Sims, we earnestly contend that there was no discharge because this man quit.

Lozano Enterprises v. N.L.R.B., 327 F. 2d 500, 502-503 (C.A. 9; 1966).

This court in the Lozano case dealt very directly with the prerogative of management in the discharge of employees and made several significant and very logical rulings. On page 502, this court stated as follows:



"Furthermore, an employer's oath that the discharged employee's membership or activity in a union was not the ground for his discharge cannot be disregarded because of a suspicion that he may have lied. There must be impeachment of him or substantial contradiction, or if circumstances raise doubts, they must be inconsistent with the positive sworn evidence on the exact point." (Emphasis ours.)

On page 503 of the Lozano case, this court

stated as follows:

"Misconduct of any degree is a logical and proper consideration in determining which of two employees is the more reliable and desirable."

Surely the evidence indicates that employee

Reagan was neither reliable nor desirable.

Again on page 503, this court stated as follows:

"The Board's error is the frequent one in which the existence of the reasons stated by the employer as the basis for the discharge is evaluated in terms of its reasonableness. If the discharge was excessively harsh, if lesser forms of discipline would have been adequate, if the discharged employee was more, or just as, capable as the one left to do the job, or the like then, the argument runs, the employer must not actually have been motivated by managerial considerations, and (here a full 180 degree swing is made) the stated reason thus dissipated as pretense, nought remains but antiunion purpose as the explanation. But as we have so often said: management is for management. Neither Board nor Court can second-guess it or give it gentle guidance by over-the-shoulder supervision. Management can discharge for good cause, or bad cause, or no cause at all. It has, as the master of its own business, complete freedom with but one specific, definite qualification: it may not discharge when the real motivating purpose is to do that which Section 8(a)(3) forbids."



Also on page 503 of the Lozano case, this court further stated as follows:

"An unlawful purpose is not lightly to be inferred. In the choice between lawful and unlawful motives, the record taken as a whole must present a substantial basis of believable evidence pointing toward the unlawful one."

The employer Pearce can not stress upon the court too strongly the belief that the Board simply brushed aside the record as a whole and adopted the Trial Examiner's findings and decision which gave not only little weight, but no weight at all, to each and every thing the employer and his witnesses stated under oath. We submit management was allowed no prerogatives as to discharge; that an unlawful purpose was lightly inferred; and that there was no substantial basis for the inferences in which the Board indulged.

2. A long line of cases holds that mere questioning of employees concerning union membership or activities is not unlawful.

Blue Flash Express, Inc., 1954 NLRB 591;  
Trumbull Asphalt Co. of Delaware, NLRB v. 327 F.2d 841;  
NLRB v. Fullerton Pub. Co. (CA 9; 1960) 41 L C 16,610;  
Weingarten, Inc., NLRB v. (CA 5; 1964) 50 L C 19, 365,  
 339 F. 2d 498.

3. An employer has the right to interview various groups of employees concerning grievances and reasons



for wanting a union.

Plywood Plastics Co., 1954 110 NLRB 306; Cooper Co., 1962 CCH NLRB 10, 987, 136 NLRB 142.

4. Insignificant interrogation as to union membership is not unlawful.

NLRB v. Coca Cola Bottling Co., (CA 7; 1964) 49 L C 19, 037, 333 F. 2d 181.

5. An employer has the right of free speech under the Act, and the evidence in this case doesn't warrant a holding Pearce went beyond that right.

NLRB v. Rockwell Mfg., (CA 3; 1959) 38 L C 65811, 271 F. 2d 109.

To be denied the right of free speech the employer's statements must be coercive in some manner. How can it be said anyone was coerced here in view of Pearce's stated views on a man's right to unionize and Charging Party's own witnesses verifying this attitude of Pearce?

In this same context the First Amendment of the Constitution of the United States protects an employer if his statements fall short of coercion.

NLRB v. Corning Glass Works, (CA 1; 1953) 23 L C 67, 619, 204 F. 2d 422.

If employees are free to make their own decision, employer's remarks are not coercive.



Teamsters Local 200 v. NLRB (CA 7: 1956) 30 L C

69, 959, 237 F. 2d 233.

All of the testimony, and particularly that of Crider (Tr. 143-144) shows that Pearce was not interfering with the employees' "American right", as he put it, to make their own determination with respect to the union.

6. An employer has the right to prefer one union over another. There was some testimony concerning a preference for a winery union.

Rold Gold of California, Inc., 1959 123 NLRB 24.

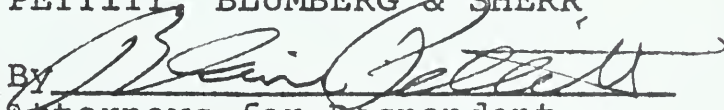
In the Rold Gold case the Board stated that it had been Board policy to hold that an employer need not remain neutral in an election campaign but may express a preference between competing labor organizations.

#### CONCLUSION

For the foregoing reasons, it is respectfully submitted that no decree should issue enforcing the Board's order in full or in part.

We particularly urge that no order should issue enforcing the Board's order with respect to any of the three discharges.

PETTITT, BLUMBERG & SHERR

By   
Attorneys for Respondent

September 1968

